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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OMAR TAYLOR,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE CHICAGO CRIME COMMISSION; THE CHICAGO POLICE DEPARTMENT, AN AGENCY OF THE CITY OF CHICAGO, A MUNICIPAL CORPORATION; THE CRIME VICTIM'S LEGAL ADVOCACY INSTITUTE, INC.; THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.; THE NATIONAL SHERIFFS' ASSOCIATION; and THE STATES OF ARIZONA AND ILLINOIS, AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Charles A. Graddick, Attorney General, State of Alabama, Counsel for Respondent, hereinafter called "State", and Robert M. Beno, Esq., Counsel for Petitioner, hereinafter called "defendant". Letters of Consent of both parties have been filed with the Clerk of this Court. States and municipal governments are not required to obtain consent to file as *amici curiae.*

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in

establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* thirty-eight times in the Supreme Court of the United States, and twenty-eight times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The Chicago Crime Commission is a not-for-profit Illinois corporation that has provided, since 1919, an independent oversight of the criminal justice system in the Chicago metropolitan area. It is composed of 350 prestigious members of the business, professional and legal community, whose purpose is the improvement of the system and a better understanding of its workings by law-abiding citizens.

The Chicago Police Department, City of Chicago, is represented by its chief executive officer, commanding the second largest metropolitan police department in America. He is responsible for the effective investigation and charging of crime in one of the most populous and diverse areas of our nation.

The Crime Victim's Legal Advocacy Institute is a national, not-for-profit, public interest law center, the purposes of which are to promote and foster the legal rights of victims of crime and to utilize the legal system to prevent, where possible, future victimization.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make

the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National Sheriffs' Association (NSA), a not-for-profit organization, has over 50,000 members, including sheriffs and their deputies, municipal, state and federal law enforcement officers, and other criminal justice professionals. NSA encourages and promotes the fair and efficient administration of justice through the establishment of standards, research, educational courses and publications and crime prevention programs.

The State of Arizona is represented by its Attorney General, an elected and constitutional official who is the chief legal officer of his State and charged with the responsibility of protecting the legal rights and interests of the citizens of his State.

The State of Illinois is represented by its Attorney General, an elected and constitutional official who is the chief legal officer of his State and charged with the responsibility of protecting the legal rights and interests of the citizens of his State.

Amici well know the problems faced by police officers in their good faith attempts to conduct criminal investigations and gather evidence by using investigative procedures that comport with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth and Fifth Amendments. The state of this intricate maze of rules applicable to arrest, search and seizure and interrogation compels these individuals and organizations to speak on behalf of the law enforcement officers in this case and all those facing similar problems as they seek to carry out their sworn duty to protect life and property.

FACTUAL AND PROCEDURAL SETTING OF THIS CASE

The facts of this case have been thoroughly presented in the opinions of the Alabama Supreme Court and the Court of Criminal Appeals, and will not be repeated at length here.

Briefly, defendant was the subject of a warrantless arrest for a robbery committed by three men in the City of Montgom-

ery, Alabama. His arrest was made on the basis of certain statements given by a prisoner awaiting trial in an unrelated, unsolved crime. The prisoner was a suspect in the same robbery for which defendant was arrested. Defendant was arrested, finger-printed, and questioned at a police station. The fingerprints matched those found at the scene of the crime on objects held by one of the robbers. After the fingerprint comparison was made a warrant for defendant's arrest was obtained. Defendant was confronted with the fingerprint evidence and questioned. His confession came six hours after the initial arrest.

Defendant does not question the voluntariness of such confession and it has been shown to have been given in full compliance with *Miranda* v. *Arizona,* 384 U. S. 436 (1966). He contends that he was arrested without probable cause and involuntarily transported to the stationhouse where his fingerprints were taken, and he was interrogated in violation of the rule in *Dunaway* v. *New York,* 442 U. S. 200 (1979).

The Court of Criminal Appeals of Alabama reversed the defendant's conviction, *Taylor* v. *State,* 399 So. 2d 875 (1980) and the Supreme Court of Alabama reversed the Court of Criminal Appeals and remanded for reinstatement of the jury verdict, *Taylor* v. *State,* 399 So. 2d 881 (1981). In doing so, the Supreme Court of Alabama stated that in view of the history and application of the exclusionary rule as applied to the states, and its obvious failure to accomplish its stated purpose of deterring unlawful police conduct, it was unwilling to extend the rule to the facts of this case.

ARGUMENT

I.

EVIDENCE OF THE DEFENDANT'S FINGERPRINTS AND HIS CONFESSION WERE ADMISSIBLE UNDER THE FOURTH AMENDMENT AND THE RULE IN DUNAWAY v. NEW YORK.

Amici will not reiterate at length the legal arguments made by the State in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, address ourselves to the important policy questions raised by the issues in this case, and to their importance to the effectiveness of law enforcement nationwide

Amici note initially, however, that the question of the admissibility of fingerprint comparison evidence was not addressed by the Court of Criminal Appeals in its opinion, *Taylor* v. *State,* 399 So. 2d 875 (1980), and was not expressly reviewed by the Supreme Court of Alabama, *Taylor* v. *State,* 399 So. 2d 881 (1981). The intermediate appellate court reversed this case on the basis of *Dunaway* v. *New York,* 442 U. S. 200 (1979), considering only the issue of admissibility of the confession. The Alabama High Court reversed the decision of the intermediate appellate court by distinguishing *Dunaway.* While it referred to the fingerprint issue, 399 So. 2d 881, 882, it thereafter discussed and ruled only on the admissibility of the confession under *Dunaway,* with an extended discussion focused upon the harshness and ineffectiveness of the exclusionary rule.

Amici agree with the State of Alabama that a serious jurisdictional question exists and that it is doubtful that this Court can consider the fingerprint issue in light of *Street* v. *New York,* 394 U. S. 576 (1969), where it was held that when a question is not presented to the state courts in such a manner that it is decided by the state's highest court when it affirms the

conviction, the Supreme Court of the United States lacks power to review the question.

Assuming, arguendo, that this Court has jurisdiction to consider the admissibility of both the fingerprint and confession evidence, it is submitted that neither should be suppressed on the basis of a finding of no probable cause. *Amici* believe that a careful review of the testimony and facts as developed in the suppression hearing, as set forth in both the intermediate appellate court opinion, 399 So. 2d 875, 876-878, and the opinion of the Supreme Court of Alabama, 399 So. 2d 881, 882, 883, will establish probable cause for the defendant's arrest. The operative facts are that the police had a description of the robber, a set of latent prints from the scene of the crime, and information specifically naming defendant. The information came from an informer who was in jail on pending charges and needed help in exchange for reliable information, and he was also a suspect in the same robbery for which the defendant was subsequently convicted. *Amici* believe that under the rule of *Aguilar* v. *Texas,* 378 U. S. 108 (1964), and *Spinelli* v. *United States,* 394 U. S. 410 (1969), and their progeny, the reliability of the informer was sufficiently established to provide probable cause for the arrest that followed. If this Court believes that the facts concerning the informer's reliability were inadequately developed at the suppression hearing, it is submitted that the case be remanded to the state court for an additional fact-finding hearing on the issue and the question of the good faith of the police officers as argued in point II, *infra.*

Even if the defendant had been arrested upon less than probable cause, we submit that *Dunaway* v. *New York,* 442 U. S. 200 (1979) does not require the rejection of his confession; any taint of the arrest had been attenuated by the time he confessed.

The following are our detailed reasons:

1. ***The interval between the arrest and confession, and the presence of intervening circumstances.***

In *Dunaway*, less than two hours elapsed between the arrest and the confession, whereas in the instant case there was a six-hour interval, during which a number of detaching events occurred. The defendant was placed in a lineup, at which the victims were unable to make an identification; his fingerprints were taken and compared with those found at the scene of the crime; the facts of the crime were presented to an independent magistrate who issued an arrest warrant on the basis of the fingerprint comparisons; the defendant was advised of his *Miranda* rights on three different occasions; and he even had a conversation with a girl friend and a male companion. All of this occurred prior to the confession.

2. *The true purpose of the police conduct with respect to the arrest.*

In *Dunaway* the defendant's arrest was purely investigatory and the officers took the position that the defendant in that case was merely "detained," whereas in the instant case the rather extensive investigation had focused on one person, Omar Taylor. He was advised immediately upon being taken into custody that he was under arrest for the robbery. The police had a description of the robber, a set of latent prints from the scene of the crime, and specific information from an informer naming defendant as a perpetrator of the crime. Even though the reliability of the informer might not have been established, the police had good reason to believe that his information was accurate. The informer was in jail awaiting trial on pending unrelated charges and needed help from the authorities in exchange for reliable information, and the informer was himself a suspect in the robbery for which the defendant was arrested. Certainly this was not a hunch or surmise similar to that which may have motivated the police in *Dunaway*, nor was it a dragnet operation similar to that in *Davis* v. *Mississippi*, 394 U. S. 721 (1969). Here there was a well considered, credible, reasonable basis for the arrest of the defendant, even if the facts did not rise to the level of probable cause. It can hardly be said

that the police here acted improperly or with any badge of flagrancy, even though, in retrospect, the sum total of the evidence might not have satisfied a technical standard of probable cause.

Two recent cases demonstrate the narrow nature of the holding in *Dunaway* and that the rule in that case does not require an automatic suppression of evidence obtained after an illegal arrest. In *People* v. *Rogers*, 421 N. E. 2d 491 (1981), the New York Court of Appeals stated: " * * * it has never been enough to show that evidence must be suppressed simply because it was discovered subsequent to an illegal arrest; it must in addition be shown that the police exploited the illegal detention in such a way as to establish that it was the detention which produced the challenged statements." 421 N. E. 2d at 494. Nothing in *Dunaway* changes this well-settled principle, the court said. It found that three inculpatory statements the defendant made during his illegal detention stemmed from the independent exercise of his free will, rather than the detention. The defendant made the first statement after being confronted with a blood-stained boot that officers discovered while pursuing a lead that had nothing to do with defendant's arrest. Having properly seized the boot, the police could ask the suspect about it. The other statements came after he talked with his brother, which was an intervening event that helped further attenuate the taint of the arrest. The police did not use the arrest to intimidate the suspect or to further their investigation.

In *State* v. *Barry*, 429 A. 2d 581 (N. J. 1981), *cert. den.*, 30 Cr L 4067 (1981), the New Jersey Supreme Court held that a defendant's otherwise voluntary confession was not tainted by his illegal arrest some 18 hours earlier. The Court distinguished this case from *Dunaway*. Although the police lacked probable cause for the arrest, there was no indication that the arrest was a pretext for obtaining a confession. Six hours after the arrest, one of the defendant's three codefendants gave a full confession

to the felony murder implicating the defendant. At that point, according to the New Jersey Supreme Court,

> the police had probable cause to hold defendant as a suspect in the murder investigation. Indeed, it was decided to bring defendant before the court to be charged with homicide along with his three co-conspirators that same day. He was then returned to Montclair Police Headquarters for that purpose. While there, and after having been given *Miranda* warnings again, he was told that his three co-conspirators had confessed and the contents of those statements were reviewed with him. He was also shown the weapons used in the robbery, as well as the deceased officer's gun, which had been recovered by the police. It was only after these events that defendant gave a full statement of his involvement in the robbery-murder.
>
> We hold that these intervening independent circumstances which preceded defendant's confession effectively purged the taint of his illegal arrest. Statements following an illegal arrest must be excluded from evidence only if they are causally related to the invasion of the suspect's rights. The instant facts do not present the close causal connection between the illegal seizure and the confession found in *Dunaway*. * * * The occurrence of other independent causative events including Murphy's confession, which directly implicated defendant, and recovery of the guns, which were shown to defendant, severed any possible chain of causation between the original illegal arrest and defendant's subsequent confession. 429 A. 2d 581, 585.

In summary, it is submitted that neither fingerprint evidence or confession should be suppressed on the basis of the rule in *Dunaway*. The Supreme Court of Alabama properly distinguished those cases from the facts of this case.

II.

ASSUMING, ARGUENDO, THAT THE DEFENDANT'S FINGERPRINTS AND CONFESSION WERE SUBJECT TO SUPPRESSION UNDER THE RULE IN DUNAWAY v. NEW YORK, SUCH EVIDENCE SHOULD NOT BE EXCLUDED, SINCE THE POLICE ACTED IN A REASONABLE GOOD FAITH BELIEF THAT THEIR CONDUCT WAS PROPER.

The basic problem in this case, as eloquently highlighted by the Supreme Court of Alabama in its opinion, 399 So. 2d 881, 883-894, is not the conduct of the police officers; it is the exclusionary rule, plain and simple. This Court is certainly able to take appropriate notice of the literal groundswell of discontent with the rule that fills the pages of court proceedings, law reviews, comments, legislative reports, newspapers and the everyday speech of our people. The problem, the cause of the problem, and a reasonable solution to the problem, is best summed up by the recent recommendation of the Attorney General's Task Force on Violent Crime:

> The fundamental and legitimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial—has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial. We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a good faith belief. We recommend that the Attorney General instruct United States Attorneys and the Solicitor General to urge this rule in appropriate court proceedings,

> or support federal legislation establishing this rule, or both. If this rule can be established, it will restore the confidence of the public and of law enforcement officers in the integrity of criminal proceedings and the value of constitutional guarantees. Attorney General's Task Force on Violent Crime, 29 CrL 3131, 3134 (1981).

To that end, two bills which would apply to federal officers have been introduced in the United States Senate in opposition to the exclusionary rule. S. 101, introduced by Senator DeConcini, would provide for a good faith exception in the case where an officer entertained a reasonable belief that his conduct conformed to the law. In contrast, S. 751, sponsored by Senators Hatch and Thurmond, would abolish the rule, and create a statutory tort remedy against the United States in its place. This bill also provides for disciplinary action against the offending officer after notice and a hearing if it is determined that the violation was deliberate. Hearings are currently being conducted on both of these bills before the Senate Judiciary Subcommittees on Criminal Justice and Criminal Law.

Recently the State of Colorado became the first state to adopt a good faith exception to the exclusionary rule by statute (Colo. Rev. Stat. 16-3-308, signed by Governor Richard D. Lamm on June 5, 1981, and taking effect July 1, 1981). The legislation was sponsored by 33 representatives and 7 senators in the Colorado legislature, and, according to its draftsman, Denver District Attorney Dale Tooley, speedy judicial review of the new statutory exception to the exclusionary rule will be sought. Other states have followed the lead of Colorado and it is anticipated that by the end of 1982 many states will have exclusionary rule reform legislation in place.

Most scholars concede that the principal rationale relied upon by this Court in adopting the rule, first in the federal forum in *Weeks* v. *United States*, 232 U. S. 383 (1914), and then for the states in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), was that suppression of evidence "illegally" seized would deter

future illicit police conduct in cases of arrest, search and seizure. This rationale, however, depends entirely upon the logical principle that *for a given individual to be deterred from doing something, he must know, at least within reasonable limits, just what it is that he is supposed to be deterred from doing.*

This is the very "linch-pin" of the deterrence argument in support of the rule. The question is not *whether* suppression of evidence deters unlawful police conduct, but, rather, given the complex, conflicting, and confusing state of the law of arrest, search and seizure today, whether the threat of suppression has the potential to deter such conduct. Based upon past experience with the exclusionary rule, the potential is lacking.

To "deter" means to discourage or restrain someone from acting or proceeding out of fear of the consequences of doing so; however, built into this definition is the concept that the actor must have some certainty, within reasonable limits, as to what conduct is permitted. Otherwise the concept of deterrence must fail because the actor simply can not fear the consequences of doing an act unless he knows, or should know, or believes, that the act is wrong. Applying this principle to modern police procedure, the officer, to be deterred, must know or believe with some reasonable certainty that his action in making a given arrest, search and seizure is "illegal" under the law. *Amici* submit that the law of arrest, search and seizure is so complex today that officers, who are not lawyers engaged in the volatile business of enforcing the criminal law, have no reasonable certainty whatever as to the legal parameters which circumscribe much of their conduct when making arrests and searches.

In order to demonstrate the contention that the law in this area has become such a morass we need look no further than the decisions of this Court. *Amici* respectfully observe that the

Justices of this Court frequently do not agree among themselves in Fourth and Fifth Amendment cases.

To illustrate, consider the *syllabi*, that is the official listing of how each Justice voted, in two relatively recent search and seizure cases from the Court.

In *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), the Court reversed a murder conviction based upon a finding of an illegal search and seizure. The syllabus reads:

> Mr. Justice Harlan concurred in parts of the opinion and in the judgment and filed an opinion. Mr. Justice Black concurred in part and dissented in part in which Mr. Justice Blackmun joined in Parts II and III and in portion of Part I. Mr. Justice White concurred in part and dissented in part in which Mr. Chief Justice Burger joined. Mr. Chief Justice Burger dissented in part and concurred in part and filed opinion.

More recently, in *United States* v. *Mendenhall*, 446 U. S. 554 (1980), where the Court affirmed the conviction of a drug suspect, the syllabus reads:

> Stewart, J., announced the court's judgment and delivered an opinion of the Court with respect to Parts I, II-B, II-C, and III, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, J., joined. Powell, J. filed an opinion concurring in part and concurring in the judgment, in which Burger, C. J., and Blackmun, J., joined. White, J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, J., joined.

In two very important cases from the last Term of the Supreme Court the pattern was repeated with agonizing results for the police. In *New York* v. *Belton*, ____ U. S. ____ (1981) the police were told that they *could* search the passenger compartment of a vehicle without a warrant, including the contents of closed containers, where the occupants were arrested on probable cause. The syllabus reads:

> Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, JJ.

> joined. Rehnquist, J., filed a concurring statement. Stevens, J., filed an opinion concurring in the judgment. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined. White, J., filed a dissenting opinion, in which Marshall, J., joined.

The very same day (July 1, 1981), the police were told in *Robbins* v. *California*, ____ U. S. ____ (1981) that they could *not* search closed containers found in the trunk of an automobile, even though they had probable cause for arrest of the driver and the search of the trunk. In *Robbins*, however, the police were put in the confusing position of not even being able to read a 5-4 or 6-3 majority opinion, as the Court could muster only four votes for a *plurality* opinion.

Amici have pondered how they should instruct their law enforcement constituency on the significance of the plurality opinion in *Robbins*. The syllabus reads:

> Stewart, J., announced the judgment of the Court and delivered an opinion, in which Brennan, White, and Marshall, JJ., joined. Burger, C. J., concurred in the judgment. Powell, J., filed an opinion concurring in the judgment. Blackmun, Rehnquist, and Stevens, JJ., filed dissenting opinions.

We respectfully submit that when this Court is so diverse in its manifold opinions in the law of arrest, search and seizure, that we not only have 5-to-4 and 6-to-3 splits as to the *actual holding* in a given case, but even further differences over *parts* and *sub-parts* in a given opinion, such opinions can have little instructive effect upon the police. Furthermore, there are plurality opinions from which not even a majority view can be gleaned by the police. In consequence, the concept of deterrence is seriously threatened.

It appears that there is little unanimity as to what does or does not constitute proper police conduct in these cases. To this we must add the enormously complicating factor that although on basic constitutional issues, the Supreme Court establishes the

controlling interpretation, this interpretation is then subject to the subsidiary interpretation of hundreds of appellate courts and thousands of trial courts across the country. The combinations and permutations of this interpretive process are staggering.

All of these complex, conflicting and confusing interpretations are expected to be digested and rigidly adhered to by the police officer, upon pain of suppression if he fails to do so. Moreover, the officer is supposed to make his interpretation on the street, often in a matter of minutes or even seconds, and often under the acknowledged dangers and stresses of police work, and with the knowledge that the community he serves *expects him to act to protect it.* The officer is expected to be "discouraged or restrained" from doing "illegal" acts in the performance of his duty, but, given the complexities outlined above, he cannot possibly know what he is or is not supposed to do in many cases; hence, the entire concept of deterrence fails. This Court itself recognized this when it stated:

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. *United States* v. *Peltier,* 422 U. S. 531 (1975) at 542.

As a way out of this morass, the state and federal courts have begun to construct their own remedies. Most recently the concept that a police officer's objective good-faith belief that his conduct was proper has been held to bar the application of the exclusionary rule to the evidence.

In *United States* v. *Williams,* 622 F. 2d 830 (5th Cir. 1980), *cert. den.,* 101 S. Ct. 946 (1981), the Fifth Circuit Court of Appeals, sitting *en banc,* stated:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery,

> it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence. 622 F. 2d 830, 846-7 (5th Cir. 1980)

This exception to the exclusionary rule is strictly limited. The *Williams* Court noted that the officer's subjective belief concerning the legality of a search is not enough. Ignorance of the basic principles of criminal procedure would obviously not constitute good faith. The police officer's actions are subject to an objective test and must be "based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." 622 F. 2d 830, 847.

The *Williams* Court noted: "It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all." 622 F. 2d 830, 842. The court further articulated the need to apply the rule only when that application can serve its originally intended purpose, deterrence. 622 F. 2d 830, 847.

As noted in *Peltier, supra,* this Court itself has recognized that the deterrent effect of police misconduct intended by the rule is significantly diminished when officers act under a valid good-faith belief that their actions are proper. In *Michigan* v. *Tucker,* 417 U. S. 433, 447 (1974), the Court stated:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a great degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

In a concurring opinion in *Brown* v. *Illinois*, 422 U. S. 590, 612 (1975), Mr. Justice Powell made the following observation on *Michigan* v. *Tucker:* "In cases in which this underlying premise is lacking, the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence."

Since the opinion of the Fifth Circuit Court of Appeals in *Williams*, other federal and state courts are rapidly beginning to look beyond alleged police misconduct to determine whether such misconduct was flagrant and purposeful, in which case the rule would apply as it was intended, or whether the misconduct was carried out under a genuine objective good-faith belief that the officer's conduct was consistent with lawful enforcement procedures, in which case the evidence would properly be admitted to assist in the determination of the guilt or innocence of the accused. *People* v. *Pierce*, 88 Ill. App. 3d 1095, 411 N. E. 2d 295, 301 (1980), is one such case. There the court stated, "... the purpose and flagrancy of the police misconduct is premier in any analysis, ..." The court then considered the totality of circumstances, found that the police intrusion was minimal and not conscious or flagrant, and held that the "reasonable and good-faith belief" exception to the exclusionary rule fashioned by the *Williams* court would apply.

In *People* v. *Adams*, 53 N. Y. 2d 1, 422 N. E. 2d 537, 29 Cr L 2173 (1981), the New York Court of Appeals applied the good-faith exception to a consent to search situation where the consenting party was not a lawful resident of the premises searched by the police. On the applicability of the rule to this specific situation, the Court of Appeals at 29 Cr L 2173 stated:

> A further, although somewhat related, consideration behind this line of reasoning involves the very purpose of the exclusionary rule ... Because the exclusionary rule is primarily aimed at deterring police misconduct, these courts have recognized that its purpose would not be furthered by applying it in instances where the police,

> believing that they are acting lawfully, engage in a search which later turns out to be "unlawful" because, in hindsight, their reasonable reliance on the consenting person's authority proves to be erroneous.

In *Richmond* v. *Commonwealth*, ____ S. W. 2d ____ (Ky. App. 1981), Kentucky effectively joined the list of jurisdictions adopting a good faith exception to the exclusionary rule. Its Court of Appeals refused to suppress drugs whose seizure, while perhaps technically illegal, was accomplished by police officers acting reasonably and in complete good faith. The evidence in *Richmond* was seized pursuant to a warrant issued by a magistrate from another jurisdiction. The Kentucky court stated: "We simply hold here, limited to the facts of this case, that the application of the exclusionary rule, even if the search warrant was illegal, would do nothing to deter future police conduct taken in the reasonable and good faith belief that the conduct was legal." I *Case Commentaries and Briefs*, No. 6, pp. 9-10 (National District Attorneys Association: December, 1981). *See also, Commonwealth* v. *Bradshaw*, ____ A. 2d ____ (Pa. Super. 1981).

In *State* v. *Lehnen*, 403 So. 2d 683 (La. 1981), the Supreme Court of Louisiana held that a reviewing court evaluating a search warrant affidavit from which it was claimed material facts were omitted could use the same approach it would in dealing with a claim that certain facts included were false. In adopting this rule the court looked with favor upon the growing "good faith" exception to the exclusionary rule. It stated at 403 So. 2d 686:

> The exclusion of reliable evidence is too high a price to pay unless exclusion is essential to deter deliberate violations of constitutional rights. Further, this approach is in accordance with the growing recognition that the exclusionary rule has limited efficacy as a deterrent in situations in which officers have acted in good faith. See *United States* v. *Williams*, 622 F. 2d 830, 27 Cr. L. 3293 (5th Cir. 1980) * * *.

In *Gray* v. *State*, ____ A. 2d ____ (Del. 1981), the Supreme Court of Delaware held that in view of the apparent good faith on the part of police officers, and the limited nature of the search made strictly in accordance with the scope of a consent to search, a 20 hour delay between the consent and a search was reasonable.

Last year the Court of Appeals for the Sixth Circuit held in *United States* v. *Bailey*, 628 F. 2d 938 (1980) that the police must usually obtain a warrant before installing a beeper and that the warrant must set a time limit on the beeper's use. However, in view of the deterrence rationale underlying the exclusionary rule, the U. S. District Court in Michigan for the Eastern District recently held in *United States* v. *Cassity*, ____ F. Supp. ____ (1981), that police acting before the decision in *Bailey* could have reasonably believed that such a strict warrant requirement was inapplicable to beeper installations. Therefore, since the officers in *Cassity* acted in "good faith" by actually securing a warrant, the District Court refused to suppress the fruit of their surveillance just because the warrant lacked the necessary termination date. The court stated:

> In this case, application of the exclusionary rule will not deter the agents who acted in good faith since *Bailey* serves that purpose, nor will it remedy the harm that has accrued to the victim of the search. * * * Neither is the integrity of this court questioned because it is not applied. The rule is fashioned by the court but its application is not mandatory where no useful purpose is served. Therefore, I decline to apply the exclusionary rule and deny defendants' motion to suppress the evidence seized as a result of the beeper monitoring. I *Case Commentaries and Briefs*, No. 7, p. 7 (National District Attorneys Association: January, 1982).

In each of the foregoing cases the officers had made arrests or searches under circumstances which, strictly speaking, violated the defendants' Fourth Amendment rights, but which were made in good faith. In all of them the court refused to suppress the evidence on the theory that since the police

reasonably, albeit erroneously, believed that their conduct was proper, it would serve no deterrent purpose to exclude the evidence.

Amici submit that the rationale of these decisions underscores the "logical impossibility of deterrence." Each Fourth Amendment application was made under circumstances in which the complexity of the law was such that the officers had reason to believe that they were acting properly even though, in hindsight, it could be found that they were not. The important point is that the courts found that they *were not deterred* because they believed, in objective good faith, that their actions were correct. Thus it would appear that the complexity of the law argument and the good faith exception are "opposite sides of the same coin," and we submit that one should reinforce the other.

Even though the officers in *Taylor* may have had some instruction regarding the legal restrictions upon arrest powers, they nevertheless assumed, in good faith, that under the facts of this case, with information coming from another suspect in the same case, and fingerprints available for comparison with Taylor's prints, there was the required basis for arresting Taylor. Another evidence of good faith is the fact that an arrest warrant was procured prior to the time Taylor confessed.

CONCLUSION

Amici join with the Supreme Court of Alabama in the view that "given the history of the development and application of the exclusionary rule as applied to the states, and its obvious failure to accomplish its stated purpose of deterring unlawful police conduct, * * *", the exclusionary rule should not be applied in this case. This case presents a timely and appropriate opportunity for the Court to adopt the good faith exception to the exclusionary rule. 399 So. 2d 881, 893.

While the police officers, from every indication in the record, acted in an objective good faith belief that their conduct comported with the Fourth Amendment, if the Court believes that the record needs to be enlarged on this point, we urge that it remand the case to the state court for a fact-finding hearing on the question of whether the police conduct was taken in the good faith belief that it was legal.

Amici respectfully submit that the decision of the Supreme Court of Alabama should be affirmed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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